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No. 84-1010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LYDIA B. CHAMPION, *et al.*,

Petitioners,

v.

GEORGE DEUKMEJIAN, *et al.*,

Respondents.

REPLY BRIEF FOR THE PETITIONERS

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Respondents (Opp., 4) argue that this case is merely a case of abuse of equitable discretion. They claim such cases are "inherently inappropriate for review." However, the settled law is that "application of an incorrect legal standard for preliminary relief and misapprehension of the law with regard to the underlying issues in the case are grounds for reversal." *Lopez v. Heckler*, 725 F.2d 1489, 1497 (9th Cir. 1984). The court reviews legal issues *de novo*. *Id.* at 1498. In a case "raising First Amendment issues," the court "has an obligation" to " 'make an independent examination of the whole record.' " *Bose Corp. v. Consumer Union of U.S.*, 104 S. Ct. 1949, 1958 (1984). The Court of Appeals failed this latter obligation, applied an incorrect legal standard for preliminary relief and misapprehended the law with regard to the underlying issues. Its action conflicts not only with the constitu-

tional principles enunciated by this Court, the Seventh Circuit and Supreme Judicial Court of Massachusetts, but also with the congressional purpose in 42 U.S.C. § 1983.

The Court of Appeals misapplied Railway Labor Act cases to foreclose preliminary relief (Opp., 12, 16) for substantial claims under the Civil Rights Act of 1871, 28 U.S.C. § 1343(3) & (4) and 42 U.S.C. § 1983. It "applied an incorrect legal standard" which indeed flouts the congressional purpose to entrust protection of fundamental rights to the equitable powers of the federal courts. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416-17 (1975).[1]

In addition the Court of Appeals "misapprehen[ded] the law with regard to the underlying" First and Fourteenth Amendment issues. It can hardly be doubted that ongoing statutory deductions for union political and ideological purposes from non-consenting non-members, implemented under the sole protection of a union-

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[1] In § 1983 Congress aimed to protect against "the deprivation of any rights, privileges, or immunities secured by the Constitution" and to authorize "a proceeding for the enforcement of those rights." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545-52 (1972). In this case the lower courts were required to exercise their power to further these "transcendent legislative purposes" and to apply remedial "standards consistent with those purposes." *Albermarle Paper* at 417. The Railway Labor Act cases are inapposite to this case for the reasons stated in the Pet., 7-8 & n.6, 19; nor do they address the preliminary relief issues here. Petitioners moved for preliminary relief on grounds that the *statute facially* and as applied violated "fundamental rights to free speech and association, to equal protection, and procedural due process of law" and asked the court to restrain deduction, retention and/or expenditure of amounts from their wages "*for so-called* fair share fees." ER, 61-62.

dominated rebate system, raises questions touching the very core of constitutional guarantees. If there is some likelihood Petitioners' claims will ultimately prevail, there would be no remedy for the rights lost or harm done when they do prevail. Protection of the public's interest and effective enforcement of Petitioners' rights, therefore, demanded injunctive relief "to prevent great, immediate and irreparable loss" of those rights, *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), pending entry of "final judgment in their favor." The decision below defies these basic principles. *Compare, Ebel v. City of Corona*, 698 F.2d 390, 392-93 (9th Cir. 1983) (ordering the district court to issue a preliminary injunction pending trial on factual issues to protect against zoning law's effect on adult bookstore); *United Church v. Medical Center Com'n*, 689 F.2d 693, 698-701 (7th Cir. 1982) (ordering the district court to issue preliminary injunction after finding legal error in leaving plaintiff's rights to the irreparable harm of an inadequate regime of due process); *Cate v. Oldham*, 707 F.2d 1176, 1186-90 (11th Cir. 1983) (ordering preliminary injunction to protect First Amendment right to petition, and noting other circuits hold that to "the extent that an infringement of First Amendment rights is shown" then "irreparable injury justifying preliminary injunctive relief is presumed").

The Court of Appeals also relied upon assertions of fact similar to those presented in the Opp Br., 3, 13. *Compare*, App. 29a, 33a, 36a. To that extent, the Court of Appeals looked improperly to the arguments of appellate counsel, *see In Re Primus* 436 U.S. 412, 434 n.27 (1978) and failed its duty to examine "the whole record,"

Bose Corp. supra.[2]

Respondents (Opp. Br., 15) advance the argument that *School Committee of Greenfield v. Greenfield Education Ass'n*, 385 Mass. 70 (1982) "is a statutory construction

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[2] (1) The record does not support the allegation "that CSEA has also instituted a refund procedure pursuant to the Act." The Gress Affidavit, filed two months after this suit commenced, in opposition to the motion for preliminary injunction, states that "CSEA's Board of Directors has directed staff to develop a recommended internal rebate procedure and report back to the board at its August 6-7, 1983 meeting." ER, 256. (2) The record does not support the allegation that CSEA "has provided objecting employees with an immediate up-front deduction in monthly dues by an amount equal to the pro rata share of CSEA's political and ideological expenditures." *Compare*, App., 33a ("the amount collected no longer includes amounts for *partisan* political purposes clearly subject to refund under the statute"). The record reflects that CSEA initially refunded that "portion [of fees, 85¢/month] withheld for CSEA'S *political action fund* (PAC) following the December 31 close of the fiscal year," in accordance with Cal. Code § 3515.8. Addendum to App. Br., 48. After the suit commenced, Controller Gress stated in an affidavit, "on June 16, 1983 CSEA officers adopted the following procedures: 'Upon receipt of a written objection from a fair share fee payer who does not agree to make a voluntary contribution to the CSEA political action fund, we will cease deduction of the political action fund amount until otherwise notified and promptly refund any amount that may have been retained since receipt of the written objection.' " ER, 430. (3) Nothing in the record reflects that CSEA has held anything "in an interest-bearing escrow account." And, it would be remarkably clairvoyant if CSEA could escrow an amount "sufficient to guarantee against temporary subsidization of any activities *later held* to be subject to refund." (4) The demand and return procedure "established by the recognized employee organization" under § 3515.8 is hardly "voluntary." It is the employees' only procedure or recourse: an exclusive statutory "right to demand" a rebate from CSEA with review in a state agency to determine whether the refund properly included union expenditures "in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment." App., 47a. The statute precludes suit against the state regarding fees. App., 46a. The contract precludes grievances regarding fees. ER, 504.

case" and immaterial to the constitutional issues decided below. But *IAM v. Street* was also a "statutory construction case," *Greenfield* at 79 n.5, and the Court of Appeals relied heavily upon it. Since *Greenfield* involves a government employer and facial, due process questions, it would appear to be far more on point. In contrast, the cases under the Railway Labor Act involved the *applied scope* of a union's authority to compel fee payments. (As under the Railway Labor Act, the Massachusetts system involved consensual payments and a request to discharge, *Greenfield* at 72-73.) In this case the legislature accepted and enacted, and the governor implemented, Pet., 5-6, that very procedure which in *Greenfield* (and New Jersey, Opp. Br., 2 n.1) the unions offered as constitutionally adequate. The attorney general and unions argued that employees must pay first and then exhaust the rebate procedure before obtaining a government determination of a valid assessment. *Id.* at 77-78.[3] The Supreme Judicial Court held that process to be constitutionally inadequate, *id.* at 82. And, in *Ellis v. Railway Clerks*, this Court held that same process to be inadequate as a remedy, rendered upon a *statutory violation, determined after a full trial to prove permissible expenditures.* 104 S. Ct. 1883, 1890 & n.7 (1984).

In applying the law to "[t]he merits" of Petitioners' claims the district court relied (App. 10a-15a) exclusively upon the circuit's decision in *Ellis*, 685 F.2d 1065, 1069-70. Thus, it held the instant statutory rebate "constitu-

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[3] In *Greenfield* at 72, 77 as well as in *Hudson v. CTU*, 743 F.2d 1187, 1190 (7th Cir. 1984), the government required payment or authorized collection *only for the purpose* of sharing "the costs of the union's efforts to negotiate and administer the collective bargaining contract" with the government employer.

tionally sufficient to override both due process and First Amendment concerns." Despite this Court's rejection of the circuit's remedial and substantive rulings in *Ellis*, 104 S. Ct. at 1890-92, the Court of Appeals decided to leave Petitioners' interests to the protection of the statutory rebate remedy and approved (App. 32a-35a) the broad collection authorization of § 3515.8.

Respondents (Opp. Br., 5-7, 14-15) deny conflict exists between the action below and the decisions of this, or other, Court[s]. However, in *Perry v. Local Lodge 2569*, the Seventh Circuit decided that a preliminary injunction was necessary to protect First Amendment rights until "a constitutionally permissible mode of [agency fee] payment" existed. 708 F.2d 1258, 1262 (1983). In *Hudson* the Seventh Circuit dealt specifically with a 42 U.S.C. § 1983 claim for injunctive relief for violation of the right to procedural due process, 573 F. Supp. at 1515. That court reversed the denial of injunctive relief which the district court, 573 F. Supp. at 1512, 1521, predicated upon the existence of a union rebate to satisfy due process of law. 743 F.2d at 1194. And, in *Greenfield*, only *after* holding "that the *statutory right* of the organization to the *permissible amount* is *outweighed by the potential* that the impermissible amounts will be used, *even temporarily*, in violation of the dissenting teachers' First Amendment rights," and only *after* requiring the union to prove the legitimacy of an assessment before a neutral, government tribunal subject to judicial review, *id.* at 82-83, 85, did the court remark about the union's access "to that portion of the fee which will be used for collective bargaining." It is inconceivable that Respondents would read that remark to justify the action below.

CONCLUSION

The issues raised in this case are of extreme importance and immediacy. The state's and lower court's actions are inflicting constitutional wrongs upon the individual and society as a whole. For all the foregoing reasons, and those presented in the Petition, this Court should grant the Petition.

Respectfully submitted,

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